

§ 3.341

combinations or permanent loss of use of extremities or sight, or the person is in the strict sense permanently helpless or bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals. The age of the disabled person may be considered in determining permanence.

(c) *Insurance ratings.* A rating of permanent and total disability for insurance purposes will have no effect on ratings for compensation or pension.

[26 FR 1585, Feb. 24, 1961, as amended at 46 FR 47541, Sept. 29, 1981]

§ 3.341 Total disability ratings for compensation purposes.

(a) *General.* Subject to the limitation in paragraph (b) of this section, total-disability compensation ratings may be assigned under the provisions of § 3.340. However, if the total rating is based on a disability or combination of disabilities for which the Schedule for Rating Disabilities provides an evaluation of less than 100 percent, it must be determined that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age.

(Authority: 38 U.S.C. 1155)

(b) *Incarcerated veterans.* A total rating for compensation purposes based on individual unemployability which would first become effective while a veteran is incarcerated in a Federal, State or local penal institution for conviction of a felony, shall not be assigned during such period of incarceration. However, where a rating for individual unemployability exists prior to incarceration for a felony and routine review is required, the case will be reconsidered to determine if continued eligibility for such rating exists.

(Authority: 38 U.S.C. 5313(c))

(c) *Program for vocational rehabilitation.* Each time a veteran is rated totally disabled on the basis of individual unemployability during the period beginning after January 31, 1985, the Vocational Rehabilitation and Employment Service will be notified so that an evaluation may be offered to determine

38 CFR Ch. I (7–1–15 Edition)

whether the achievement of a vocational goal by the veteran is reasonably feasible.

(Authority: 38 U.S.C. 1163)

[46 FR 47541, Sept. 29, 1981, as amended at 50 FR 52774, Dec. 26, 1985; 55 FR 17271, Apr. 24, 1990; 58 FR 32445, June 10, 1993; 68 FR 34542, June 10, 2003]

§ 3.342 Permanent and total disability ratings for pension purposes.

(a) *General.* Permanent total disability ratings for pension purposes are authorized for disabling conditions not the result of the veteran's own willful misconduct whether or not they are service connected.

(Authority: 38 U.S.C. 1502(a))

(b) *Criteria.* In addition to the criteria for determining total disability and permanency of total disability contained in § 3.340, the following special considerations apply in pension cases:

(1) Permanent total disability pension ratings will be authorized for congenital, developmental, hereditary or familial conditions, provided the other requirements for entitlement are met.

(2) The permanence of total disability will be established as of the earliest date consistent with the evidence in the case. Active pulmonary tuberculosis not otherwise established as permanently and totally disabling will be presumed so after 6 months' hospitalization without improvement. The same principle may be applied with other types of disabilities requiring hospitalization for indefinite periods. The need for hospitalization for periods shorter or longer than 6 months may be a proper basis for determining permanence. Where, in application of this principle, it is necessary to employ a waiting period to determine permanence of totality of disability and a report received at the end of such period shows the veteran's condition is unimproved, permanence may be established as of the date of entrance into the hospital. Similarly, when active pulmonary tuberculosis is improved after 6 months' hospitalization but still diagnosed as active after 12 months' hospitalization permanence will also be established as of the date of entrance into the hospital. In other cases the

Department of Veterans Affairs

§ 3.343

rating will be effective the date the evidence establishes permanence.

(3) Special consideration must be given the question of permanence in the case of veterans under 40 years of age. For such veterans, permanence of total disability requires a finding that the end result of treatment and adjustment to residual handicaps (rehabilitation) will be permanent disability of the required degree precluding more than marginal employment. Severe diseases and injuries, including multiple fractures or the amputation of a single extremity, should not be taken to establish permanent and total disability until it is shown that the veteran after treatment and convalescence, has been unable to secure or follow employment because of the disability and through no fault of the veteran.

(4) The following shall not be considered as evidence of employability:

(i) Employment as a member-employer or similar employment obtained only in competition with disabled persons.

(ii) Participation in, or the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1718(f))

(5) The authority granted the Secretary under 38 U.S.C. 1502(a)(2) to classify as permanent and total those diseases and disorders, the nature and extent of which, in the Secretary judgment, will justify such determination, will be exercised under § 3.321(b).

(c) *Temporary program of vocational rehabilitation training for certain pension recipients.* (1) When a veteran under age 45 is awarded disability pension during the period beginning on February 1, 1985, and ending on December 31, 1995, the Vocational Rehabilitation and Employment Division will be notified so that an evaluation may be made, as provided in § 21.6050, to determine that veteran's potential for rehabilitation.

(2) If a veteran secures employment within the scope of a vocational goal identified in his or her individualized written vocational rehabilitation plan, or in a related field which requires reasonably developed skills and the use of some or all of the training or services furnished the veteran under such plan,

not later than one year after eligibility to counseling under § 21.6040(b)(1) of this chapter expires, the veteran's permanent and total evaluation for pension purposes shall not be terminated by reason of the veteran's capacity to engage in such employment until the veteran has maintained that employment for a period of not less than 12 consecutive months.

(Authority: 38 U.S.C. 1524(c))

[26 FR 1586, Feb. 24, 1961, as amended at 26 FR 9674, Oct. 13, 1961; 29 FR 3624, Mar. 21, 1964; 39 FR 14944, Apr. 18, 1974; 46 FR 47541, Sept. 29, 1981; 50 FR 52775, Dec. 26, 1985; 53 FR 23235, June 21, 1988; 55 FR 17271, Apr. 24, 1990; 56 FR 25044, June 3, 1991; 56 FR 65851, Dec. 19, 1991; 58 FR 32445, June 10, 1993]

§ 3.343 Continuance of total disability ratings.

(a) *General.* Total disability ratings, when warranted by the severity of the condition and not granted purely because of hospital, surgical, or home treatment, or individual unemployability will not be reduced, in the absence of clear error, without examination showing material improvement in physical or mental condition. Examination reports showing material improvement must be evaluated in conjunction with all the facts of record, and consideration must be given particularly to whether the veteran attained improvement under the ordinary conditions of life, *i.e.*, while working or actively seeking work or whether the symptoms have been brought under control by prolonged rest, or generally, by following a regimen which precludes work, and, if the latter, reduction from total disability ratings will not be considered pending reexamination after a period of employment (3 to 6 months).

(b) *Tuberculosis; compensation.* In service-connected cases, evaluations for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities (part 4 of this chapter). Where in the opinion of the rating board the veteran at the expiration of the period during which a total rating is provided will not be able to maintain inactivity of the disease process under the ordinary conditions of life, the case will be submitted under § 3.321.